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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY
AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

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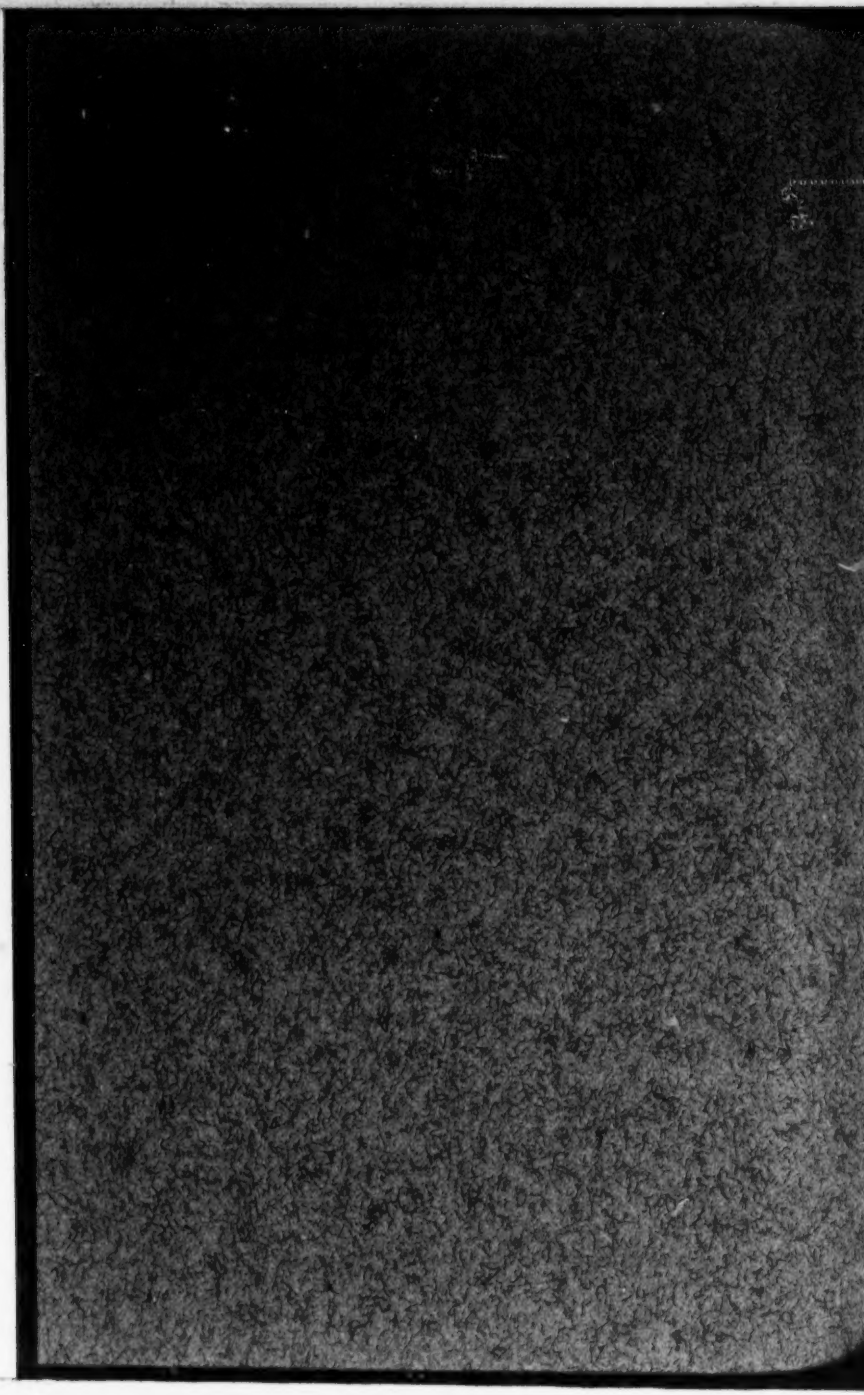

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vs.

KATHERINE H. FORD, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

Official Record Below.

The opinion of the Supreme Court of South Carolina, dated May 11, 1932, has not yet been officially reported and is found in the record, pp. 144-216.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237, Judicial Code (U. S. C. A., Title 28, Section 344), as amended by the Act of February 3, A. D. 1926, Chapter 229, 43 Stat. 937, the opinion of the

Supreme Court of South Carolina being a final judgment in a suit in the highest court of the State of South Carolina. There was drawn in question the validity of Section 4925 in connection with Section 4903 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, and a decision was made upholding the validity of the statute.

Statement of the Case.

The suit was brought by the appellee in the Court of Common Pleas for Clarendon County, South Carolina, to recover damages in the sum of $25,000 for personal injuries alleged to have been sustained by her in a collision between a passenger train of the appellant railroad company, operated by its engineer, the appellant William Smith, and an automobile at a public highway crossing of the track of the railroad company. At the time of such collision the appellee was riding on the front seat of such automobile, which was being driven by her husband. In her complaint she alleged specifically that the accident was proximately caused by the joint negligence and wilfulness of the railroad company and its engineer in failing: (1) to keep a proper look-out, (2) to stop the train in time to avoid the collision, (3) to have the train equipped with proper brakes, (4) to have the train operated by a competent engineer, (5) to provide a safe crossing, and (6) to give the signals required by the statute of South Carolina (R., pp. 3-4).

The answer, after denying the allegations of the complaint, set up the affirmative defenses of gross con-

tributory negligence and of contributory wilfulness on the part of the appellee, and in addition alleged that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, on which appellee specifically relied in her complaint, were null and void as being a burden upon and a regulation of interstate commerce in violation of Article I, section 8, subdivision 3, of the Constitution of the United States; and further that these sections 4903 and 4925 as construed by the Supreme Court of South Carolina denied to the appellants the equal protection of the laws and deprived them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States (R., pp. 4-6).

The case duly came on for trial before the court and a jury. The appellee proved the collision with the train, and personal injuries sustained as a consequence (R., pp. 10, 15, 18, 24, 25, 28). She failed to introduce a scintilla of evidence, however, in support of the first six specifications of negligence and wilfulness detailed in paragraph 4 of her complaint (R., pp. 3-4), and her right to recover was left to depend entirely on the last specification, which charged failure to give the signals required by sections 4903 and 4925.

The railroad company in rebuttal proved that appellee and her husband attempted to cross its track in an automobile with the curtains up; that the crossing was at a right angle with the track which was straight and level for nearly a mile to the right, which appellee was facing; that the view was absolutely

unobstructed for all this distance; that all the signals were properly given; that the train was in all respects properly operated; and that the accident was due to the fault of appellee and her husband. It further proved that the train involved was a regular passenger train, running between Charleston, S. C., and Greenville, S. C., and that it was regularly engaged, and on the day of the accident was actually engaged, in the transportation of interstate passengers and interstate mail.

At the close of the case, the appellants moved for a directed verdict on the grounds now appearing at pages 112 and 113 of the record. The fourth of these grounds specifically asserted that sections 4903 and 4925, without which appellee could not have recovered, deprived the appellants of their property without due process of law and denied to them the equal protection of the laws in violation of the Fourteenth Amendment, and in addition constituted an unlawful burden upon and regulation of interstate commerce in violation of the commerce clause of the Constitution. This motion was refused.

Thereupon, appellants renewed their attack on the statute in question by their requests to charge, as will appear by reference to pages 118-120 of the record. All of such requests were refused (R., p. 120).

A verdict was duly rendered in favor of appellee, and a motion for a new trial was promptly made and as promptly overruled (R., pp. 132-133).

The case then went to the State Supreme Court on exceptions which appear at pages 133-143, inclusive, of

the record, and the judgment below was affirmed (R., p. 197). In these exceptions, as in the answer, the motion for a directed verdict, the requests to charge, and the motion for a new trial, the appellants raised in detail the identical constitutional questions raised in the assignment of errors presented to the Chief Justice of the State when the appeal to this Court was allowed (R., pp. 133-143, 218-219).

As construed and applied by the Supreme Court of South Carolina, the statute attacked in this appeal as being unconstitutional, which is hereinafter set out, has in effect made railroad companies insurers of both the lives and the property of travelers on highways who come into collision with railroad trains at grade crossings. So onerous and unfair to railroad companies is this statute as it is constantly applied by the highest court of the State that in all crossing accidents the railroad is always at fault if a jury so wills it, and the State courts will not as a matter of law declare to the contrary. This very case demonstrates and emphasizes the truth of this statement, as the recovery was based on evidence that could not possibly have been true and that was so completely destroyed as to leave absolutely no support for the verdict. In an effort to obtain relief, the appellants by this appeal now come to this Court and ask that such statutes be declared void as an infringement of their constitutional rights.

Specifications of Assigned Errors Intended to be Urged.

Appellants urge each and every one of the errors set forth in the assignment of errors (R., p. 222), which are as follows:

ASSIGNMENT OF ERROR No. 1.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deprive the defendant railroad company of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERROR No. 2.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deny to the defendant railroad company the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERROR NO. 3.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not constitute burdens upon and regulations of interstate commerce in violation of Article I, section 8, subdivision 3, of the Constitution of the United States.

ARGUMENT.

Summary of the Facts.

In the statement of the case, the appellants have made a résumé of the facts showing how the constitutional questions presented by the appeal were raised and decided in the courts below. Avoiding as much as possible any repetition, the appellants now present the following additional facts that are essential to give the Court a proper and full conception of the case.

The accident occurred at 9:30 a. m. on the railroad company's line between Manning, S. C., and Alcolu, S. C. This line crosses Black River swamp just to the north of the town of Manning, and after so doing curves to the left into a straight track which extends for a mile or more beyond the place of the accident. State highway #26, which is paved, also crosses Black River swamp to the north of Manning, coming out of the swamp close beside the track of the railroad company which it parallels to Alcolu. About three-fourths

of a mile north of the swamp, State highway #4 branches off to the right from highway #26 and crosses the railroad track at right angles. Between this highway crossing and the river swamp, there are no obstructions whatever between the railroad track and highway #26, and any person traveling on highway #26 and turning into highway #4 has a plain and unobstructed view of the track and of any trains thereon all the way to the curve after the track comes out of the river swamp, which is nearly a mile. These physical facts were established not only by the oral testimony in the case but also by the plat which was put in evidence.

On the morning of the accident, which was rainy, the husband of the appellee proceeded north out of Manning on highway #26, driving a Buick touring car, with the curtains up (R., p. 7), with appellee riding on the front seat (R., p. 8). When they reached the intersection with highway #4, they turned into it and in attempting to pass over the railroad track at the crossing of highway #4, they collided with the train. The testimony of the witnesses on behalf of appellee other than appellee herself and her husband, as well as the testimony of the witnesses for the appellants, showed beyond any question that the signals were given by the train for this crossing (R., pp. 31, 34, 43, 45, 46, 49-52, 59, 79). Two of the witnesses stopped on the opposite side of the track from that on which appellee approached it because they heard the train coming and heard the signals but did not see it as their view was obstructed by the woods on that side (R., pp. 45, 46). However, both appellee and her

husband testified that they, although riding in a car with the curtains up, looked and listened before going on the track and that they heard no signals and that they would have heard them had they been given (R., pp. 10, 15, 18, 24, 25, 28). The physical facts showed beyond any doubt that the testimony so given was untrue, as if they had looked and listened they would have been compelled to see the train which was bearing down on them on a perfectly straight and level track with absolutely nothing in the way to obstruct the view. This impossible testimony on the part of appellee and her husband raised the presumption under Sections 4903 and 4925 that the failure to give the signals was negligence on the part of the railroad company that proximately caused the accident, and this presumption based on such impossible testimony is the sole basis on which appellee recovered her judgment.

It further appeared from the evidence that the appellee had taken at least one drink of whiskey on the day of the accident (R., p. 17), that whiskey was found in the car after the wreck (R., pp. 33, 63, 64, 67, 76, 79, 83, 84, 85, 87), and the physician who treated the appellee after the accident stated that after making a thorough examination of her, he reached the conclusion that she "had drunk too much whiskey" (R., pp. 99-100). In addition, one witness testified that Mr. Ford, when asked as to what caused the accident, stated that he had taken too much whiskey (R., p. 68). From all of the testimony it would seem clear that both of the Fords were under the influence of whiskey at the time of the accident, though they denied it, and

that the signals were all properly given. This being true, there should not as a matter of law be any liability against either the railroad company or its engineer. On this point we call the Court's particular attention to the following language of Mr. Justice Cothran in his dissenting opinion, which was adopted by Judge Grimball:

> "Mr. Ford testified that he looked *as well as he could* down the track and saw no train; Mrs. Ford testified that 'the curtains were up, being a rainy, misty morning I did the best I could to look for trains. *It was hard to see*' (R., p. 24).
>
> "We have this situation presented: An automobile, with the curtains drawn, is being driven in a pouring rain, along a highway parallel with a railroad and very near to it, which gave the driver notice of the railroad; the driver makes a short turn, 60 feet from the crossing, informed of the crossing by a sign post 10 feet high with crossarms, and makes for the crossing without stopping or otherwise taking the slighest care for his safety; at any point from the turn to the crossing a coming train on a perfectly straight track could have been seen for nearly a mile; there was not an obstruction to his view at any point on the approach. It appears too plainly that if he had taken the slighest care he is obliged to have seen the train. The Court is not bound to accept his statement that he looked and did not see it or to consider it evidence" (R., p. 200).

On this evidence, the dissenting judges held that a verdict should have been directed for the defendants below.

However, thanks to sections 4903 and 4925, with the presumption of liability arising from the impossible testimony of appellee and her husband, a judgment has been returned in her favor and it has been affirmed by the Supreme Court of the State.

Points of Fact.

The points of fact we would stress under the foregoing statement of the case and summary of the evidence are:

1. The testimony of the appellee and her husband to the effect that they did not see the train, heard no signals, and that none were given, although demonstrated to be false, raised a presumption under sections 4903 and 4925 that the railroad company was guilty of negligence that was the proximate cause of the injuries received by the appellee, and that such presumption did not vanish when the defendants introduced their evidence but remained throughout the case and was considered by the jury in rendering the verdict in favor of the appellee. In fact, such presumption is the sole ground in the case on which the verdict can possibly rest.

2. The case is identical in all points with that of *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. ed. 884, and not similar in any particular to the case of *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. ed. 78.

3. The evidence in the instant case in behalf of the appellant railroad company was far stronger, and the

evidence in behalf of appellee much weaker, than the evidence for the appellant and appellee, respectively, as shown by the decision of this Court in *Western & Atlantic R. Co.* v. *Henderson, supra.*

4. It conclusively appears that this case is identical in point of fact to that of *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, 72 L. ed. 167, and the decision in that case should have ruled this case regardless of sections 4903 and 4925 of the South Carolina Code.

Points of Law.

The points of law are succinctly stated in the assignment of errors quoted above, and it would be a useless repetition to restate them at this point. In the course of the discussion, we shall set forth under appropriate heads the principal reasons for contending that the statute violates the various constitutional provisions on which the appellants rely. With this statement, we now come to a discussion of the questions of law presented by the appeal.

In view of the fact that the questions of due process of law and of the equal protection of the laws arising under the Fourteenth Amendment are so closely interwoven, both brevity and clarity will be promoted by considering them to a large extent together. This brings us, therefore, to the first question arising under the assignment of errors, which may be stated thus:

I. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, violate the due process

of law and the equal protection of the law clauses of the Fourteenth Amendment to the Federal Constitution, and are therefore void. (Assignment of Errors 1 and 2, R., p. 218.)

The manner in which these questions were raised has been fully set forth in the preceding part of this brief and will not be repeated here.

The judgment recovered in this case is based solely on a presumption that arises under a construction, interpretation and application by the Supreme Court of the State of sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922.

It is so firmly settled as to be axiomatic that the construction and interpretation of a State statute by the highest court of the State are to be considered just as much a part of it as if actually expressed in the text.

Knights of Pythias v. *Meyer*, 265 U. S. 30, 68 L. ed. 885;

Leffingwell v. *Warren*, 2 Black 599, 17 L. ed. 261;

St. Louis, etc. Co. v. *Kansas City*, 241 U. S. 419, 60, L. ed. 1072;

Standard Oil Co. v. *Graves*, 249 U. S. 389, 63 L. ed. 662;

Thornton v. *Duffy*, 254 U. S. 361, 65 L. ed. 304;

Ward v. *Krinsky*, 259 U. S. 503, 66 L. ed. 1033;

Bunch v. *Cole*, 263 U. S. 250, 68 L. ed. 290;

Missouri, ex rel. Hurwitz v. *North*, 271 U. S. 40, 70 L. ed. 818;

Chicago, etc. R. Co. v. *Risty*, 276 U. S. 567, 72 L. ed. 703.

And in the light of such construction and interpretation, the validity of such statute under the Federal Constitution must be determined.

Price v. *Illinois,* 238 U. S. 446, 59 L. ed. 1400;
Missouri, etc. R. Co. v. *Nebraska,* 164 U. S. 403, 41 L. ed. 489;
W. W. Cargill Co. v. *Minnesota,* 180 U. S. 452, 45 L. ed. 619;
Lindsley v. *Natural, etc. Co.,* 220 U. S. 61, 55 L. ed. 369;
Purity, etc. Co. v. *Lynch,* 226 U. S. 192, 57 L. ed. 184.

A.—Judicial Construction of the Statute Under Attack.

The statute here under consideration is found in sections 4903 and 4925 of Volume 3 of the Code of South Carolina of 1922.

Section 4903 provides:

> "A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a standstill within less distance than one hundred rods of such crossing such bell shall be rung or such whistle sounded for at

> least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place: Provided, that a gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

Section 4925 declares:

> "If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

We do not contend that section 4903 standing alone is unconstitutional. On the contrary, we recognize it apart from section 4925 as a proper safety measure. The statute we are assailing is section 4925 with section 4903 read into it by the specific terms of section 4925. Section 4925 is clearly severable from section

4903, and if the former is declared unconstitutional, this will carry with it the latter in so far as it has been made a part of section 4925, but will still leave section 4903 in force in so far as it is a safety measure.

The South Carolina Supreme Court has thus interpreted and applied section 4925 with section 4903 read into it, as it must be by the terms of section 4925.

(See dissenting opinion of Mr. Justice Cothran, R., pp. 202-205.)

(*a*) In a suit under section 4925 for injuries received in a collision at a crossing, the failure to give the signals prescribed by section 4903 is negligence *per se*. This is settled by the cases of:

Strother v. *R. Co.*, 47 S. C. 375, 25 S. E. 272;
Callison v. *R, Co.*, 106 S. C. 123, 90 S. E. 260;
Keel v. *R. Co.*, 108 S. C. 390, 95 S. E. 64;
Timmons v. *R. Co.*, 138 S. C. 82, 136 S. E. 67.

(*b*) In a suit brought under section 4925, negligence *per se* of the railroad company arising from the failure to give the signals required by section 4903 is *presumed* to be the proximate cause of the collision at the crossing and of the injuries to the plaintiff received therein, and to warrant recovery by plaintiff without further proof.

Strother v. *R. Co.*, 47 S. C. 375, 25 S. E. 272;
Edwards v. *R. Co.*, 63 S. C. 271, 41 S. E. 458;
Bishop v. *R. Co.*, 63 S. C. 532, 41 S. E. 308;
Turbyfil v. *R. Co.*, 83 S. C. 325, 65 S. E. 278;
Lee v. *R. Co.*, 84 S. C. 125, 65 S. E. 1031;
Lawson v. *R. Co.*, 91 S. C. 201, 74 S. E. 473;

Peeples v. *R. Co.*, 115 S. C. 115, 104 S. E. 541;
Miller v. *R. Co.*, 140 S. C. 123, 138 S. E. 675;
McBride v. *R. Co.*, 140 S. C. 260, 138 S. E. 803;
Brogdon v. *R. Co.*, 141 S. C. 238, 139 S. E. 459;
Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801;
Whitehead v. *R. Co.*, 153 S. C. 339, 150 S. E. 769;
Stabler v. *R. Co.*, 160 S. C. 191, 158 S. E. 267.

(*c*) In a suit brought under section 4925, failure to give the signals required by section 4903 "is sufficient to warrant a reasonable inference of recklessness, wilfulness or wantonness, and therefore to carry that issue to the jury", but it is not recklessness, wilfulness or wantonness *per se*.

Goodwin v. *R. Co.*, 82 S. C. 327, 64 S. E. 242;
Rowe v. *R. Co.*, 85 S. C. 25, 66 S. E. 1056;
Callison v. *R. Co.*, 106 S. C. 123, 90 S. E. 260;
Keel v. *R. Co.*, 108 S. C. 390, 95 S. E. 64;
Miller v. *R. Co.*, 140 S. C. 123, 172-173, 138 S. E. 675;
Key v. *R. Co.*, 144 S. C. 164, 142 S. E. 336.

(*d*) The only defense available to the railroad company, aside from a denial of liability, is that the plaintiff at the time of the accident either was acting in violation of law or was acting with a "conscious disregard of consequences" amounting to wilfulness.

Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801.

(*e*) The issue is not, as in all other suits, as to whether the failure to give signals was *the proximate*

cause **of the accident since that is *fixed*, but whether *signals were given* and if only one witness gives testimony merely that he did not hear any signals, the case must be submitted to the jury and this will be sufficient to sustain a verdict against the railroad company for both negligence and wilfulness.**

Callison v. *R. Co.*, 106 S. C. 123, 90 S. E. 260;
Key v. *R. Co.*, 144 S. C. 164, 142 S. E. 336;
Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801;
Stabler v. *R. Co.*, 160 S. C. 191, 158 S. E. 267.

In *Lawson* v. *R. Co.*, 91 S. C. 201, 74 S. E. 473, the court said:

> "Where an act is negligence *per se* the jury *must find negligence.* Where it is a mere evidence of negligence, the jury may or may not find that the defendant was negligent. The failure to sound the bell or whistle has been declared by this Court to be negligence, and if the jury had believed from the evidence that neither the bell was rung nor the whistle sounded, then *they were bound to find for plaintiff.*"

Again, in *Whaley* v. *Ostendorf*, 90 S. C. 281, 73 S. E. 186, the court declared:

> "Where evidence of negligence is only *prima facie*, it is subject to rebuttal, but when there is negligence *per se*, it is *conclusive of that question.*"

The case of *Lawson* v. *R. Co., supra*, was expressly approved by the court in *Miller* v. *R. Co.*, 140 S. C. 123, 138 S. E. 675.

(*f*) **In every action *ex delicto* in South Carolina there must be proof of proximate cause except in collision cases at a crossing where a railroad is the defendant.**

Cirsosky v. *Smathers*, 128 S. C. 358, 122 S. E. 864;
McCown v. *Muldrow*, 91 S. C. 523, 74 S. E. 386;
Whaley v. *Ostendorf*, 90 S. C. 281, 73 S. E. 186.

See the dissenting opinion of Mr. Justice Cothran in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803, where the authorities are collated.

(*g*) This section 4925, with section 4903 read into it, precludes the application in South Carolina of the standard of conduct governing railroad and traveler in crossing accidents prescribed by this Court in *B. & O. R. Co.* v. *Goodman*, 275 U. S. 66, 72 L. ed. 167.

This standard, which is based on the fundamental conception of the mutual rights and the mutual obligations of the respective parties as judged by the circumstances of the situation, has been rejected by the Supreme Court of South Carolina on the ground that it conflicts with sections 4903 and 4925, and that they furnish the sole standard of conduct in that State.

Key v. *R. Co.*, 150 S. C. 29, 147 S. E. 625;
Holladay v. *R. Co.*, 150 S. C. 243, 147 S. E. 927.

From the decisions cited above, these conclusions follow: An automobile driver, without stopping, looking or listening, drives his car onto a grade crossing and collides with a train. He, or the person riding

with him, is injured. He brings suit, alleging various acts of negligence. The case comes on for trial. Plaintiff proves the fact of the collision and the injury. The evidence is overwhelming that the signals were given as required by section 4903. Plaintiff, although cooped up in a closed car, swears that he did not hear the signals. Then the challenged statute comes into play. Immediately, without proving more, due to the interpretation put on it by the court, if the jury believes, based on plaintiff's wholly negative statement, that the signals were not properly given, there is created as a matter of law a presumption that the railroad's negligence was the proximate cause of plaintiff's injury, and that such injury was wilfully and wantonly inflicted. The plaintiff is not a railroad employee—that is immaterial. There is absolutely no proof of causal connection between the failure to give signals and the collision—that is immaterial. The evidence may show that the failure to give the signals could not have caused the accident—that is immaterial. (This was the case in *McBride* v. *R. Co., supra.*) If the jury believes signals were not properly given, that is the end of it. The presumption does the rest.

But this is not all. The plaintiff says he heard no signal. The jury on this says that no signal was given, and on this the statute says that the failure to give the signal is presumed to be the proximate cause of the accident. This presumption does not give way to proof. In fact, *the question of proximate cause is not an issue at all,* but the sole issue is whether the signal was given. *It is constantly and arbitrarily p esumed*

that the failure to give the signal properly was the proximate cause of the collision, and, as we shall demonstrate, this artificial presumption is weighed by the jury as against indisputable evidence to the contrary. A verdict based on nothing but the statement of the plaintiff that he heard no signal will stand in the face of conclusive proof that signals had nothing whatever to do with the accident.

B.—This Statute, Found in Section 4903 in Connection with Section 4925 of the South Carolina Code, is Not Due Process of Law.

Of the reasons assigned for contending that due process of law is denied by this statute, some arise on the face of the sections themselves and others on the interpretation and application given to them by the courts. We consider first the invalidity of the statute as interpreted and applied by the courts.

1. *This statute raises arbitrary and unreasonable presumptions and allows the plaintiff to recover thereon without proving proximate cause.*

The purpose always in view in the prevailing opinion seems to be to get away from the fact that the presumption created by section 4925 to the effect that the failure to give the signals was both negligence *per se* and the proximate cause of appellee's injury did not vanish from the case when appellants introduced their evidence, but remained throughout the case to be considered by the jury as evidence therein. This opinion did not succeed, as indeed it could not

succeed, in showing that such presumption does not continue throughout the case; and this is the *crux* of the whole matter.

At the top of page 172 of the record, the learned justice states that no case had been brought to their attention wherein it had been held that "the presumption remained throughout the entire case to be weighed as opposing evidence in fixing liability". This statement is wholly incorrect, as all the recent cases under these statutes demonstrate. But of this we shall have more to say presently.

We are dealing with rights guaranteed by the Constitution of the United States, and such rights can not be frittered away by the mere use of words. In passing on such rights, this Court considers what the State court did, not what it said. This is conclusively established by the following decisions:

Scott v. *McNeal,* 154 U. S. 34, 38 L. ed. 892;

Kansas City, etc., R. Co. v. *C. H. Albers Commission Co.,* 223 U. S. 573, 56 L. ed. 556;

Creswill v. *Grand Lodge,* 225 U. S. 246, 56 L. ed. 1074;

Davis v. *Wechsler,* 263 U. S. 22, 68 L. ed. 143;

Lacoste v. *Department of Conservation,* 263 U. S. 545, 68 L. ed. 437;

Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 68 L. ed. 569;

Gregg Dyeing Co. v. *Query,* 286 U. S. 472, 76 L. ed. (adv. ops.) 852.

Such being the principles by which the case is to be decided here, the inquiry is: What did the State Supreme Court do?

When the appellants moved for a directed verdict, the trial court overruled the motion on the ground that sections 4903 and 4925 were constitutional by reason of the decision of this Court in the case of *Mobile, etc. R. Co.* v. *Turnipseed,* 219 U. S. 35, 55 L. ed. 78 (R., p. 117).

The gravamen of the decision in the case of *Mobile, etc. R. Co.* v. *Turnipseed, supra,* is that the presumption of liability vanished as soon as the defendant introduced evidence, and the appellants, after the Court had ruled that this case saved these sections from the vice of unconstitutionality, sought to have the benefit of the principles decided by such case. They therefore presented requests to charge 4 and 5 squarely raising this issue, and these requests were flatly refused by the Court (R., pp. 119, 120). These requests to charge read as follows:

> "4. I charge you that under a proper construction of sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, the failure to give at the highway crossing involved in this suit the signals required thereby (if there by such failure) affords no presumption whatever that such failure was the proximate cause of the collision between the automobile in which plaintiff was riding and (fol. 150) the train of the defendant railroad company, but plaintiff must prove what was the proximate cause of such collision and that the defendants were responsible therefor."
>
> "5. I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, as soon as the railroad company introduced evidence

> rebutting plaintiff's evidence that the signals required thereby were not properly given for the crossing involved in this suit, the temporary inference of fact arising from plaintiff's evidence completely vanished from the case and there is now no presumption whatever that the collision was caused by the negligence of the defendants as a proximate cause thereof, and it is incumbent on plaintiff to prove what was the proximate cause of such collision and that the defendants were responsible therefor."

In addition, as shown by Mr. Justice Cothran in his dissenting opinion (R., p. 207), the trial judge, in adopting and charging appellee's fourth request to charge, in effect "charged that the presumption arising from the failure to give the signals may be considered with any and all other evidence in the case."

The appellee's fourth request to charge (R. pp. 129, 130), which the trial judge gave is as follows:

> " '4. I further charge you that failure to give the signals in the manner provided and required by the statute read to you is negligence *per se,* or negligence as a matter of law, and that such circumstances, if shown, may be considered with any and all other evidence in the case in considering the question of wilfulness. The statute requires that the whistle shall be kept sounding or the bell kept ringing until the engine has crossed the highway. Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the failure to give the signals is the proximate cause of the injury. But such

> presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause.' That is true. As I explained to you in connection with that statute just now, the failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants by its evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause."

It thus affirmatively appears that the trial judge, in this very case, both negatively and positively held that the presumption raised by the statute did not vanish when the defense introduced their evidence but continued throughout the case to be considered by the jury in fixing liability.

On the appeal to the State Supreme Court, error was charged in this action of the trial judge in refusing to charge requests 4 and 5 on the part of the defense and in charging request number 4 on the part of the plaintiff below (Exceptions 5, 7 and 8, R., pp. 137-140). If these sections are to be construed by the rule laid down by this Court in the *Turnipseed* case, exceptions 7 and 8 in the court below, addressed to the refusal to charge requests 4 and 5 on the part of the defense, should have been sustained. Likewise, exception 5 in the court below, addressed to the error in charging request number 4 on the part of the plaintiff, should have been sustained. If these three exceptions in the court below had been sustained, the

Turnipseed case would have been applied and the judgment in favor of the appellee would have been reversed. But instead of doing this, the Court declares at the end of its opinion (R., p. 197) that "all the exceptions presented have received the careful consideration of the Court and are overruled." This conclusively demonstrates that regardless of any language used in the opinion, the action of the Court can only be construed as holding that the presumption created by this statute continued throughout the entire case. This is the inescapable conclusion when we apply the principle that this Court looks to what was done and not to what was said.

In the following analogous cases the Supreme Court of South Carolina has held that a presumption of liability does not vanish "on the introduction of opposing evidence" but remains throughout the entire case to be given "the effect of evidence to be weighed against opposing testimony" of the defendant:

Baker v. *Tel. Co.*, 57 S. C. 174, 69 S. E. 151;
McLeod v. *R. Co.*, 95 S. C. 71, 76 S. E. 79;
Glenn v. *R. Co.*, 96 S. C. 357, 80 S. E. 898;
Matthews v. *R. Co.*, 98 S. C. 204, 82 S. E. 138;
Ervin v. *R. Co.*, 106 S. C. 354, 91 S. E. 317;
Perryman v. *R. Co.*, 105 S. C. 34, 89 S. E. 497;
Thompson v. *R. Co.*, 113 S. C. 261, 102 S. E. 11;
Cato v. *R. Co.*, 164 S. C. 123, 162 S. E. 239.

It is quite true that no crossing case in South Carolina has come out and held in so many words that the presumption arising under this statute continues

throughout the case to be weighed against opposing evidence, but the action of the Court in every such case compels the conclusion that such is the effect of such presumption In fact, the argument that the presumption does not continue throughout the case to be considered by the jury as evidence is a shining example of *reductio ad absurdum.* If a witness testifies that no signals were given and no proof to the contrary is adduced, this statute, as construed by the highest court of the State, declares that the failure to give the signals is negligence *per se* and that a presumption arises therefrom that such failure was the proximate cause of the injury. Should there be no evidence in rebuttal, the presumption continues throughout the case. This much must be admitted because there is nothing to cause it to disappear. The situation is in no way different when evidence is offered by the defense in rebuttal. This evidence is not, and can not be, offered against the presumption as to proximate cause, but is addressed solely to the giving of the signals. Under such evidence, the jury finds whether signals were given, and the statute, with its arbitrary presumption as to proximate cause, makes out a case for the plaintiff. If the presumption does not vanish from the case when it is admitted that no signals were given, why does it vanish when the jury finds from the evidence that no signals were given? This demonstrates the utter fallacy of the contention. In fact, the matter is conclusively set at rest by the decision of this Court in *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. ed. 884, where this language is used:

> "By authorizing the jury, *in the absence of evidence,* to find negligence in the operation of the engine and train, the Court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." (Italics added.)

From this quotation it is clear that this Court has declared that a finding of negligence must be held to rest either on evidence or on presumption. Under the Georgia statute, the plaintiff proved the collision, but was not required to prove that it was the result of actionable negligence. On this, the statute raised a presumption of such negligence. So that in reaching a verdict, the jury could not weigh evidence of actionable negligence offered on the part of the plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff was not required to show that the acts he complained of constituted actionable negligence at all. Hence the jury in making its findings necessarily weighed the presumption in favor of the plaintiff against the positive evidence in favor of the defendant. Precisely the same situation is presented under the statute here assailed. The plaintiff is required to produce no evidence whatever either on the question of negligence or on the question of proximate cause, but is required merely to produce some evidence, it matters not how flimsy, on the question of the giving of signals. On such evidence as to failure to give signals, just as on the evidence as to the happening of the accident under the

Georgia statute, arises a two-fold presumption as to negligence and proximate cause or a presumption of actionable negligence. In reaching a verdict under this South Carolina statute, the jury does not weigh evidence of actionable negligence offered on the part of the plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff is not required to show that the acts of which he complains constitute either negligence or the proximate cause of his accident. Hence, the jury in coming to a conclusion must, under this statute, weigh the presumption as to actionable negligence arising in favor of the plaintiff against the positive evidence of the defendant. No other conclusion is possible, and to argue otherwise is but beating the air against the decision of this Court in the *Henderson* case.

The late cases of *Whitehead* v. *R. Co.*, 153 S. C. 339, 150 S. E. 769, and *Brogdon* v. *R. Co.*, 141 S. C. 238, 139 S. E. 459, declare that the rule of interpretation of this statute to be followed in the future is that announced in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803. This was repeated in the case at bar. The rule announced in the *McBride* case is expressed in these words:

> "From our consideration of this question, we are satisfied that the proper construction of the statute leads to the conclusion that when a person is injured by a collision with the engines or any car or cars of a railroad corporation at a crossing, and the railroad failed to give the statutory signals at such time and place, the presumption arises that the failure to give the signals is the proximate cause of the injury,

> since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute."

Now, couple this statement with the further rule announced in *Lawson* v. *R. Co.*, 91 S. C. 201, 74 S. E. 473, *Callison* v. *R. Co.*, 106 S. C. 123, 90 S. E. 260, *Key* v. *R. Co.*, 144 S. C. 164, 142 S. E. 336, *Glenn* v. *R. Co.*, 145 S. C. 41, 142 S. E. 801, and *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267, that if even one witness testifies that he heard no signals, while a host of others testify they were given, the jury may find they were not given and on such finding alone render a verdict for the plaintiff, and we have a summary of the effect of this rather remarkable statute.

As thus construed, its invalidity as a denial of due process of law would seem to be settled by the recent decision of this Court in *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. ed. 884. In that case, plaintiff's intestate was killed in a collision at a railroad grade crossing between a truck he was driving and a train of the railroad. Plaintiff recovered under a statute of Georgia which declared that on proof of the happening of such an accident a presumption arose that it was due to the negligence of the railroad as a proximate cause. In the course of its opinion reversing the judgment and holding the statute void as a denial of due process of law, this Court said:

> "Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and

that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the Court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect.

"Appellee insists that paragraph 2780 is valid, and argues that *the presumption, being one established by statute,* has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption; that 'it should not as a matter of law be dissipated the instant any testimony is taken against it'; and that the issue is to be determined on a consideration of all the evidence *including the presumption.*

"Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. *A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.*" (Italics added.)

And then it reached this conclusion:

> "The *presumption* raised by par. 2780 is *unreasonable* and *arbitrary* and violates the due process clause of the 14th Amendment. *Manley* v. *Georgia, supra; McFarland* v. *American Sugar Co.*, 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145."

This case has been approved and followed in the two recent cases of *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, and *Heiner* v. *Donnan*, 285 U. S. 312.

The prevailing opinion, however, seeks to get away from the destructive effect of the *Henderson* case on this statute by reciting the fact that the complaint in that case contained six allegations of negligence and that the statute there involved raised a presumption of liability as to each of such charges (R., pp. 167-170). The attempted distinction is absolutely groundless. In the first place, this Court held clearly and unequivocally in the *Henderson* case that the statute of Georgia was void because it "permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove" that the operation of the train was not negligent in any respect, and further that it was *arbitrary*. This being true, it did not make any difference whether the complaint contained one allegation of negligence or a thousand, as the statute would have been just as much void in the one instance as in the other.

It is well settled in South Carolina, as elsewhere, that a plaintiff does not have to prove all of his allega-

tions of negligence but can recover on one material allegation alone. The present case is a perfect example of this fact, as the recovery here is on the last allegation in the complaint, which allegation was not supported by proof but merely by the very presumption against which we are now contending.

Now why should a statute be void as denying due process of law and the equal protection of the laws that authorizes a recovery on a presumption based on six allegations of negligence, while another is perfectly valid under the same constitutional provisions that authorizes a recovery on a presumption based on a single allegation of negligence? By the same process of reasoning, a magazine rifle is a deadly weapon while a single shot rifle carrying the same cartridge is a harmless toy. The effect of each on the victim is the same; but, of course, under the contentions of the advocates of the validity of this statute, this makes no difference. Unfortunately for them, however, the decisions of this Court may effect the test of constitutionality, and thus with one blow demolish all of their theories.

In the leading opinion, it is attempted to be argued that there is a causal connection between the failure to give signals and the happening of an accident at a crossing (R., pp. 176-177). In doing this, the Court was merely reiterating what had been previously decided in the *McBride* case, *supra*, in which the Supreme Court of South Carolina declared that collision and injury at a crossing is "the natural and probable consequence of the failure to give the signals". This Court completely

annihilated such contention in the *Henderson* case, using this language:

> "The mere fact of collision between a railway train and a vehicle at a highway grade crossing *furnishes no basis* for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or both or without fault of anyone. *Reasoning does not lead from the occurrence back to its cause*".

But suppose we go a step further. This Court in the *Henderson* case declared that if a presumption is *arbitrary*, the statute is invalid. That the presumption here under discussion is arbitrary is conclusively demonstrated by the action of the court in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803, and *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267. In the *McBride* case, the court applied the presumption that the failure to give the signals was the proximate cause of the injury *in favor of a man who admitted he was on the track in a condition, by reason of an epileptic fit, in which he could hear nothing.* In the *Stabler* case, they applied the same presumption in favor of a man riding in a truck, who, the court admitted, *could not have heard the signal if it had been given*, as it would have been drowned by the noise of the truck. If any presumption could be more arbitrary, we can not conceive of it.

Unless this Court shuts its eyes to the obvious, it must know that hundreds of travelers are killed each year on our highways in automobile accidents, many of which do not involve railroad collisions; that automobile

drivers are notorious for their non-observance of speed and other traffic regulations; and that most, if not all, of the fatalities in motor accidents on the highways of this country are due to the negligence, not to say wilfulness, of the drivers. Indeed, so well known is the manner of operating automobiles that the Supreme Court of Tennessee recently described it in *Southern Railway Co.* v. *Simpson,* 149 Tenn. 458, 261 S. W. 677, in these words:

> "A murderous contempt for all regulations ordained to control their movements is too common among those operating motor vehicles to justify the court in permitting such lawlessness to be rewarded, unless the statutes so compel".

In the face of all this, to say that in *all* collisions between a railroad train and an automobile at a grade crossing, the collision is "the natural and probable consequence of the failure to give the signals" is a conclusion wholly groundless and against the experience of mankind. Its fallacy was tersely but conclusively demonstrated by the *Henderson* case in the language quoted above.

That there is no necessary causal connection between the failure to give signals and a collision at a crossing not only is demonstrated by the *Henderson* case, but is supported by a multitude of other authorities. A vast number of these are collated in the dissenting opinion of Mr. Justice Cothran in the case of *McBride* v. *R. Co.,* 140 S. C., on pages 285 to 293, inclusive, and a host of others will be found in Century Digest, title Railroads, sections 1090-1095; in First, Second and

Third Decennial Digests, title Railroads, section 337 (5); and in the Annuals of the American Digest, title Railroads, section 337 (5).

It is said, however, that this statute falls under the case of *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. ed. 78. As has already been stated, the lower court, in refusing the motion for a directed verdict, so held, but in so doing, utterly failed to grasp the significance of either the *Henderson* case or the *Turnipseed* case. The Supreme Court of the State, in the leading opinion, also failed in the same respect, as it held in one breath that the *Turnipseed* case controlled this case, and in the very next breath overruled all of appellants' exceptions that complained of error on the part of the trial court in failing to give them the benefit of the *Turnipseed* case. If the *Turnipseed* case applied, the railroad company was entitled to have the statute construed in accordance therewith, and on the other hand, if the *Henderson* case applied, the verdict should have been directed. There was absolutely no middle ground.

The facts and ruling in the *Turnipseed* case were briefly these: Hicks was an employe of the railroad and was killed while on duty. His administrator, Turnipseed, sued his employer in a Mississippi state court. Plaintiff won below and in the Supreme Court of Mississippi. The trial judge applied section 1985 of the Mississippi Code which is as follows:

> "Injury to persons or property by railroads *prima facie* evidence of want of skill, etc. In all actions against railroad companies for

> damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies".

The statute was attacked on the ground that it violated the due process and equality clauses of the Fourteenth Amendment.

The Court sustained the act on the ground that (1) it constituted a mere rule of evidence, not *a rule of liability* (see *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380, 382, 59 L. ed. 279, specifically so holding); (2) it was limited to cases where either an employe or passenger sued—in other words, it applies only where plaintiff and defendant railroad are related by contract; (3) it created a mere rebuttal inference relating to a matter peculiarly within the railroad's knowledge; (4) as soon as proof was introduced, the inference ended—in other words, the presumption could not be weighed against actual testimony; and (5) such a rebuttable and reasonable inference or presumption was valid when there was "some rational connection between the fact proved and the ultimate fact presumed".

The reason for sustaining the statute in the *Turnipseed* case is thus stated by this Court in the *Henderson* case:

> "Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi

> statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co.* v. *Brown,* 138 Miss. 39, 66, et seq., 102 So. 855; *Columbus & G. R. Co.* v. *Fondren,* 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate".

Indeed, as appears from the decisions of the Supreme Court of Mississippi in *Gulf, etc. Co.* v. *Brown,* 138 Miss. 39, 102 So. 855, *Columbus, etc. R. R. Co.* v. *Fondren,* 145 Miss. 679, 110 So. 365, and numerous other cases, the statute involved in the *Turnipseed* case *disappears completely* when the facts come out, the rule being stated thus:

> "Where the facts are in evidence, the jury must determine the negligence or lack of negligence from the evidence and not from the statute. Where the defendant's version of the facts is disputed by the plaintiff, then the duty devolves upon the jury to determine the truthfulness of the testimony; they can not sidestep that duty by invoking the statute in such cases".

Following the decision of this Court in the *Henderson* case, the Supreme Court of Mississippi in the case of *New Orleans, etc. R. Co.* v. *Walden,* 160 Miss. 102, 133 So. 241, held that unless the evidence by the plaintiff is undisputed, no instruction should be given to the jury on the statutory presumption.

In the case of *Seaboard, etc. R. Co.* v. *Fountain,* 173 Ga. 593, 160 S. E. 789, the court had under considera-

tion the crossing statute of Georgia which was adopted after this Court in the *Henderson* case declared the statute there involved to be invalid. This second statute of Georgia was identical with the statute of Mississippi involved in the *Turnipseed* case. The trial court charged the jury that proof of the injury inflicted by the running of the locomotive or cars of a railroad company was *prima facie* evidence of negligence, but that this was subject to rebuttal, and if the railroad showed to the satisfaction of the jury that it exercised proper care, such *prima facie* case would be rebutted. The Supreme Court of Georgia held that the instruction was erroneous and would render the statute unconstitutional if adopted, using this language:

> "Thus the Supreme Court of the United States by clear implication holds that the Mississippi Statute which we have under consideration would be unconstitutional and void if the Supreme Court of that State had held that it had any greater effect than to create a mere inference which would disappear whenever the railroad company introduced any evidence tending to disprove the existence of such negligence. In view of the construction of the Mississippi Statute by the Supreme Court of that State and the Supreme Court of the United States, we feel constrained to hold that the instruction complained of by the railroad company was erroneous and that a new trial should be granted."

How vastly different is the effect of the statute here assailed! Neither it nor its arbitrary presumption ever disappears from the case, but both remain throughout,

and on such presumption and such presumption *alone* and unsupported by a shred of testimony, the jury may (and one case, *Lawson* v. *R. Co., supra,* says they *must*) find a verdict against the railroad company supposed to be based on its negligence as a proximate cause.

Again, this Court expressly sustained the statute involved in the *Turnipseed* case on the ground that it did not declare *a rule of liability.* The statute here under attack does declare a rule of liability that has been adopted as a matter of convenience.

Charleston, etc. R. Co. v. *Varnville Furniture Co.,* 237 U. S. 597, 59 L. ed. 1137.

These considerations, we respectfully submit, effectually dispose of the contention that this statute can be sustained under the decision in the *Turnipseed* case.

But to come again to the *Henderson* case. The Georgia statute there involved declared that upon proof of injury to a person by a servant or instrumentality of a railroad, there arose "not only a presumption of negligence by the company, but a presumption that the company's negligence was the proximate cause of the injury."

Western, etc. R. Co. v. *Dobbs,* 36 Ga. App. 516, 137 S. E. 407;

Georgia, etc. R. Co. v. *Bailey,* 9 Ga. App. 106, 70 S. E. 607;

Central of Georgia R. Co. v. *Barnett,* 35 Ga. App. 524, 134 S. E. 126;

Payne v. *Wells,* 28 Ga. App. 29, 109 S. E. 926;

Murphy v. *Georgia R., etc. Co.,* 146 Ga. 297, 91 S. E. 108;

Georgia, etc. R. Co. v. *Thornton,* 144 Ga. 381, 87 S. E. 383;
Western, etc. R. Co. v. *Thompson,* 144 S. E. 831;
Ellenberg v. *Southern R. Co.,* 5 Ga. App. 389, 63 S. E. 240.

In short, under the Georgia statute, a plaintiff proves that he is injured in a collision at a railroad crossing, and the twofold presumption arises (1) that the railroad was negligent, and (2) that such negligence was the proximate cause of the injury. Under Sections 4903 and 4925, a plaintiff proves his injury at a crossing and swears he heard no signals, and from this a jury may find that signals were not given, even against the contrary testimony of any number of witnesses, from which finding arises the twofold presumption (1) that the railroad was negligent, and (2) that such negligence was the proximate cause of the injury. When thus placed in juxtaposition, the statute of Georgia condemned in the *Henderson* case, and Sections 4903 and 4925 here assailed are seen to present no essential difference. Under the Georgia statute, the plaintiff proves injury by collision, *but does not prove proximate cause.* Under the South Carolina statute, the plaintiff proves his failure to hear signals, but *does not prove proximate cause. Both statutes are identical in that they do not require proximate cause to be proved,* but instead permit this indispensable element of the right of plaintiff to recover to be *supplied by presumption.* Indeed, as we interpret it, this is the real ground of the decision in the *Henderson* case.

It is elementary that a party may not be mulcted in damages merely because of negligence. The negligent act must cause, in whole or in part, the injury complained of. Proximate cause is not a fact which is subject to inference or presumption. It must be proved by the plaintiff and so proved as to take the cause of the accident out of the "realm of speculation and conjecture."

Atchison, etc. R. Co. v. *Toops*, 281 U. S. 351, 74 L. ed. 896;

Chicago, etc. R. Co. v. *Coogan*, 271 U. S. 472, 70 L. ed. 1041;

New Orleans, etc. R. Co. v. *Harris*, 247 U. S. 367, 62 L. ed. 1167;

Patton v. *R. Co.*, 179 U. S. 658, 45 L. ed. 361.

The precise question came before this Court in the comparatively recent case of *Sweeney* v. *Erving*, 228 U. S. 233, 57 L. ed. 815, which was a suit by a patient against a physician for personal injuries received from X-ray burns during the course of treatment. The Court held that while there might be an inference of negligence from the fact of the burns—*res ipsa loquitur*—yet the burden remained on the plaintiff throughout the trial to show that such negligence was actionable, that is, *that it was the proximate cause of the injury.*

The rule is thus stated in 22 R. C. L., 206:

> "The modern rule is that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, *he must show a causal connection between the injury received and the disregard of*

the statutory prohibition or mandate—that the injury was the proximate result". (Italics added.)

This statement of the principle is supported by text writers and decided cases "innumerable as the stars for multitude," as will appear by the collation of the authorities in the dissenting opinion of Mr. Justice Cothran in *McBride* v. *R. Co.*, 140 S. C. at pages 282 to 290, inclusive. In fact, the prevailing opinion in the *McBride* case recognizes the application of this principle in all cases other than those arising under Sections 4903 and 4925, and then seeks to draw a distinction in cases under these sections that will warrant a presumption of proximate cause. This alleged distinction is that the collision was the natural and probable consequence of the failure to give the signals—a view that was rejected in the *Henderson* case.

In the *McBride* case, it is stated that these sections were designed as safety measures, and that this also justifies dispensing with the necessity of proving proximate cause by the plaintiff. But merely calling them safety measures by name does not make them such in fact.

Washington, etc. R. Co. v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

Section 4903, standing alone, may be freely conceded to be a safety measure and as such constitutional, but coupled with Section 4925, it has no such purpose. Section 4925 was intended to afford a right of recovery in favor of a person injured at a railroad crossing;

and as construed by the courts it was further intended to give every advantage to such plaintiff and every disadvantage to the railroad. As thus construed, it practically insures a recovery by a plaintiff in a damage suit for a crossing collision and does not bear the remotest resemblance to a proper safety regulation. Due process of law requires that the law operate exactly alike on both plaintiff and defendant (*United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588), and when so-called regulations fail so to do, they must fall.

This provision of the Fourteenth Amendment extends to every instrumentality of the state, and in determining whether due process has been afforded to the party invoking the provision, the courts must look to substance, and not to form.

> *Chicago, etc. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979.

This statute may be a safety regulation in form; but in substance, it is not. Hence this can not save it.

Coming back to the specific point, the authorities are legion that in order for one injured at a railroad crossing to "recover he must be able to show that the omission of the signals was the proximate cause of his injury."

> 3 Elliott on Railroads (last ed.), sec. 1652;
> 3 Elliott on Railroads (3d ed.), sec. 1648;
> 1 Shearman & Redfield on Negligence, Secs. 25, 26;
> Bigelow, Torts, 608-626;
> 3 Lawson, Rights, etc., sec. 1183;
> 33 Cyc. 1045;

Railroad Co. v. *Hoadley,* 122 Ill. App. 165;
Railroad Co. v. *Mertz,* 40 So. 60 (Ala.);
Butcher v. *R. Co.,* 37 W. Va. 180, 16 S. E. 457;
Chicago, etc. Co. v. *Crisman,* 19 Col. 30, 34 P. 286;
Pennsylvania Co. v. *Rathgeb,* 32 Ohio St. 66;
Cleveland, etc. Co. v. *Baker,* 24 Ind. App. 152, 54 N. E. 814;
Morier v. *Hines,* 81 N. H. 48, 122 Atl. 330;
Elgin v. *R. Co.,* 220 Ill. 462, 77 N. E. 151;
Southern Co. v. *Daves,* 108 Va. 378, 61 S. E. 748;
Kujawa v. *R. Co.,* 135 Wis. 562, 116 N. W. 249;
Texas, etc. Co. v. *McKissack,* 152 S. W. 815 (Tex.);
Southern Co. v. *Crawford,* 164 Ala. 178, 51 So. 340;
Ackerman v. *R. Co.,* 58 Ind. App. 212, 108 N. E. 144;
Texas, etc. Co. v. *Hemphill,* 58 Tex. Civ. App. 232, 125 S. W. 240;
Horn v. *R. Co.,* 54 Fed. 301;
East, etc. R. Co. v. *King,* 81 Ala. 177, 2 So. 152;
Central, etc. R. Co. v. *Brinson,* 70 Ga. 207;
Toledo, etc. R. Co. v. *Jones,* 76 Ill. 425;
Wabash, etc. R. Co. v. *McNown,* 53 Ind. App. 116, 99 N. E. 126;
Parker v. *R. Co.,* 86 N. C. 221;
Stahl v. *Lake, etc. R. Co.,* 117 Mich. 273, 75 N. W. 629;
Century Digest, Title Railroads, secs. 1090-1095;

First, Second and Third Decennial Digests, Title Railroads, Sec. 337 (5);
Annuals of American Digests, Title Railroads, Sec. 337 (5).

It is said, however, that the State Court in the *McBride* case held that this causal relationship raised by presumption was not thereby "shown conclusively" and that the presumption established a *prima facie* case that might be overcome by testimony, and that this saves the statute from the condemnation of the *Henderson case.* Not so.

As appears from the case of *Central, etc. R. Co.* v. *Barnett,* 35 Ga. App. 524, 134 S. E. 126, the Appellate Court of Georgia, in construing the statute held invalid in the *Henderson* case, held that the burden of proof remained on the plaintiff throughout the trial to sustain the *prima facie* case made out by the presumption; yet, regardless of this, this Court held that the presumption vitiated the statute. So the fact the presumption makes out only a *prima facie* case has no weight. In fact, all that this statement in the *McBride* case means is that the defendant railroad has an opportunity to *introduce evidence* to show, just as it had under the Georgia statute, that it was not responsible for the accident—with this important difference, however, in favor of the Georgia statute: There the railroad could rebut the case made by plaintiff in practically any way it saw fit; while under the construction given to sections 4903 and 4925 by this Court, in the recent case of *Glenn* v. *R. Co.,* 145 S. C. 41, 142 S. E. 801, the railroad, in rebutting plaintiff's case estab-

lished by this arbitrary presumption, is confined to the two affirmative defenses of wilful conduct and violation of law on the part of the plaintiff at the time of the collision.

The trial court in the case of *Seaboard, etc. R. Co.* v. *Fountain,* 173 Ga. 593, 160 S. E. 789, ruled that the presumption arising under the Georgia statute, which was an exact copy of the Mississippi statute involved in the *Turnipseed* case, made out a *prima facie* case which was subject to rebuttal. This is exactly what the Court has ruled in the instant case, and in so doing states that all constitutional objections are removed. In reversing such ruling, the Georgia Supreme Court held that if so construed the statute was clearly unconstitutional under the *Henderson* case, which is undoubtedly correct.

So that even if the arbitrary presumptions of these statutes were subject to rebuttal, this would not save them. Complete dissipation of these presumptions as a matter of law on the coming in of opposing testimony, and not an empty right of rebuttal resting on the whim and caprice of a petit jury, is the least that can possibly save these statutes from condemnation.

Prior to the decision in the *McBride* case, the circuit courts could direct verdicts in crossing cases, and they would be sustained. But since that case and those that have followed it, no circuit judge can now say as a matter of law either that this arbitrary presumption has been overcome, or that the plaintiff was responsible for the accident. Under the present state of the decisions, the jury and the *jury alone* can say whether this presumption has been rebutted, and *the jury can*

render a verdict on the presumption alone without a scintilla of evidence to support it. This is exactly what was condemned in the *Henderson* case.

In the case of *Whitehead* v. *R. Co.*, 153 S. C. 339, 150 S. E. 769, the Court declared that when testimony was given to the effect that no signal was given, it

> "is presumed to have contributed to the alleged injury as a proximate cause thereof; that is, a *prima facie* case was established. Such presumption may be overcome by evidence, but, as stated above, *whether or not such presumption was overcome by evidence is as a general rule a question for the jury,* and the Trial Judge should refuse to submit question to the jury only in cases where there is no conflict in the testimony and the only reasonable inference to be drawn therefrom leads conclusively to the conclusion that the person injured was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury as a direct and proximate cause thereof." (Italics added.)

The same Judge substantially repeated this statement of the rule in his concurring opinion in the case of *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267. The same thing was held in the case at bar.

So that the Supreme Court of South Carolina has interpreted this statute as giving rise to a presumption of negligence as a proximate cause of an injury at a crossing on testimony that signals were not given, and holds that such is a *prima facie* case, subject to rebuttal. As appears from the quotation, the rebuttal

is limited to three things: (1) There must be no conflict in the testimony that the signals were given; (2) the inference to be drawn must be that the person injured was guilty either of gross or wilful negligence, or was acting in violation of law; and (3) that the conduct of the injured party was the direct and proximate cause of the injury.

A statute that makes it impossible to say, as a matter of law, what was the proximate cause of an accident can not be due process of law. Such a statute in effect declares that the presumption created thereby is not rebuttable. True, the railroad in such a suit is accorded the privilege of offering evidence, but of what possible avail is this when the jury is at liberty to render a verdict against it on the vital element of proximate cause *without a vestige of testimony as to proximate cause?* Manifestly, when the overcoming of the presumption as to proximate cause thus rests solely on the whim and caprice of the jury, it is but a mockery to say the defendant railroad is afforded the opportunity to rebut such presumption. Such a right of rebuttal may be given in form, but it is effectually denied in substance. The so-called right of rebuttal "keeps the promise to our ear, and breaks it to our hope." A fair opportunity to repel the presumption being denied, due process of law is not afforded.

Western, etc. R. Co. v. *Henderson, supra,* and cases cited;

Chicago, etc. R. Co. v. *Chicago, supra.*

The appellee here has not made out such a case as should entitle her to recover either in law or in morals.

Take away the impossible testimony of her and her husband that they did not hear any signals and the arbitrary presumption applied to the finding of the jury thereon, and her case would collapse like a house of cards. A recovery by the appellee under the facts of this case solely by virtue of this presumption proves more convincingly than words the fact that it is arbitrary and unreasonable.

As we see it, the appellee has no case on the facts; and the Supreme Court of South Carolina would have been compelled to direct a verdict against her if it were not for the decisions holding that the failure to give signals, even where such failure is not shown by substantial evidence to exist, is a presumption of the existence of negligence on the part of defendant as a proximate cause of the collision. By refusing to direct a verdict in this case, the Court but reiterated the ruling that proximate cause may be established by presumption if a jury so decrees.

But it is said that the presumption arising under sections 4903 and 4925 is a rule of evidence and therefore valid. This, however, will not save these sections. Burden of proof is a matter of substance and not a mere rule of evidence.

> *New Orleans, etc. R. Co.* v. *Harris,* 247 U. S. 367, 62 L. ed. 1167.

It is one thing to provide by statute a reasonable rule of evidence as is done by the Mississippi Prima Facie Act, upheld in the *Turnipseed* case; but quite another to permit presumptions to have the force of substantive evidence and to establish proximate cause

as was done by the Georgia statute held void in the *Henderson* case. This is not due process of law.

In the leading opinion, much space is devoted to a discussion of the necessity for presumptions in the law of evidence. With this principle we are in full accord, but it is wholly beside the mark in so far as the instant case is concerned. As held by this Court in *Western & Atlantic R. Co.* v. *Henderson, supra,* in order for a presumption of fact to arise from proof of a given state of facts, there must be "a rational connection between what is proved and what is to be inferred"; and there is not only no rational connection but *no connection at all* between the failure to give signals by a train for a crossing and an injury sustained by a deaf man in a collision with such train at the crossing, as was presumed in the leading case of *McBride* v. *R. Co., supra.* When the test laid down by this Court in the *Henderson* case is applied, the presumption created by this statute is found to bear no resemblance to a presumption of fact. On the contrary, it is demonstrated to be an arbitrary rule of substantive law arbitrarily adopted as a rule of convenience and precisely of the same nature as the presumption so clearly analyzed by Mr. Justice Holmes in *Charleston, etc. R. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 59 L. ed. 1137. Being an arbitrary presumption of such a nature, it clearly falls under the condemnation of the case of *Western & Atlantic R. Co.* v. *Henderson, supra,* and renders the statute void.

Viewed from every angle, there is, as we see it, no escape from holding this statute void as denying due process of law for the reasons above assigned.

2. *By reason of Sections* 4903 *and* 4925, *the standard of conduct to be observed by a traveler and a railroad in the use of a grade crossing laid down by the Supreme Court of the United States in Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, *is not applicable in South Carolina.*

The State Supreme Court expressly so ruled in the cases of *Key* v. *R. Co.,* 150 S. C. 29, 147 S. E. 625, *Holladay* v. *R. Co.,* 150 S. C. 243, 147 S. E. 927, and in the instant case. No Federal question was involved in either the *Key* case or the *Holladay* case, and the court distinctly said in both that in cases turning on Federal questions, the Federal decisions would be binding. In the instant case, the train was shown to be engaged in interstate commerce, and in addition, it presented other Federal constitutional questions of the most serious nature.

This Court laid down no new doctrine in the *Goodman* case, but it merely stated a rule of conduct based on the fundamental conception of the rights and obligations of the respective parties based on their situation at the time. The railroad uses a fixed track and its trains are necessarily heavy, and when in motion are not readily, quickly and safely stopped by the use of even the most effective mechanical appliances that human skill and ingenuity have been so far able to devise. This must ever be the case, as the problem grows out of immutable physical laws. On the other hand, the automobile operates on no fixed rail, and is so light, flexible and capable of control that it may either be readily turned aside or quickly brought to

a stop by its driver. Taking judicial notice of these universally known facts, this Court in the *Goodman* case said:

> "When a man goes upon a railroad track, he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train for him."

This is the gist of the decision, and we submit it is the only decision that can be rendered consistent with due process of law. It is true the court goes on to say that the traveler must get out of his vehicle and look *if the conditions make it necessary;* and to this there never has been advanced any valid objection, if he is under the duty properly to take care of himself, and the railroad company is not held to occupy the position of an insurer of his safety.

This South Carolina statute is the very antithesis to the *Goodman* case, for, carried to their logical conclusions, the decisions rejecting *in toto* the ruling in the *Goodman* case must be held to mean that the rights of the traveler on the highway are superior to the rights of the railroad at the crossing, regardless of the physical facts and conditions of the case. If the rule is not, as the *Goodman* case states, that the train can not stop, while the driver can, and therefore must, stop, then the converse must be true, to-wit, that the traveler is under no duty to stop, while the train can and therefore must stop. Such a result makes the railroad an insurer of the life of every person crossing its track at grade crossings. Instead of being a safety

measure, this statute, by refusing to recognize the principle of the *Goodman* case, puts a premium on negligence on the part of travelers on the highway and tends to promote rather than to prevent accidents.

In the instant case as well as in the cases of *Key* v. *R. Co., supra,* and *Holladay* v. *R. Co., supra,* the court in repudiating the *Goodman* case acted as if the only thing that case decided was that under certain circumstances it was the duty of a traveler in an automobile to get out and look before attempting to cross the track. The court wholly ignored the real ground of the decision to the effect that the duties of the railroad company and of the traveler are mutual, but that by reason of the different physical conditions governing each, the traveler is under the duty to stop and not the railroad company.

In the case of *Stabler* v. *R. Co.,* 160 S. C. 191, 158 S. E. 267, which arose under the very statute we are now attacking, the State Supreme Court, in an unanimous opinion, showed that it approved of the doctrine that in South Carolina by virtue of this statute the rights of the traveler are superior to those of the railroad company when it comes to the use of a grade crossing. We quote:

> "While the Legislature has commanded a traveler on a highway to bring his vehicle to a full and complete stop (35 Stats. at Large, 1316) before entering or crossing any express highway in the State highway system (*Townsend* v. *State Highway Department,* 156 S. C. 545, 153 S. E. 572). It has never seen fit to command that travelers either stop, look, or

listen before entering upon or crossing a railroad track. The duty so to do is not absolute; whether a failure so to do is reckless gross negligence or wilful misconduct depends upon the then surrounding circumstances and the state of the traveler's mind.

The decision in the *Cable* case has been modified by the fourth and fifth paragraphs (pages 402, 403, of 121 S. C., 114 S. E. 500, 503), of the decision in the *Chisolm* case.

As held in the *Chisolm* case: 'It is ordinarily a question for the jury * * * to say whether the attempt of the traveler to cross without looking and listening effectively was excusable or culpable; that is, whether or not it amounted to negligence or wilful misconduct'. See also *Whitehead* v. *A. C. L. R. R. Co.*, 153 S. C. 339, 150 S. E. 769."

This is a direct repudiation of the principle of the *Goodman* case and a declaration that the traveler always has the right of way at a railroad crossing.

As further illustrative of the gross discrimination in favor of travelers on the highways as against railroads in the use of grade crossings, we call attention to the latest deliverance of the South Carolina Supreme Court in *Key* v. *R. Co.*, 165 S. C. 43, 162 S. E. 582. In construing section 4925, the trial court charged the jury:

"It (*i. e.*, the statute) requires the act of the traveler on the highway to be of greater degree of negligence than the negligence of the railroad company in order to defeat the right of recovery on the part of the traveler. Now you

> keep that in mind when considering the liability under the statute."

This charge was approved on appeal, and the *Goodman* case was thereby again repudiated.

Growing out of the physical facts of the situation, the general rule of law governing the rights and obligations of a traveler and of a railroad with respect to the use of a grade crossing is thus well expressed in Shearman & Redfield on Negligence, Volume 2, section 463:

> "The rights of a traveler on the highway, at a point where it is crossed on a level by a railroad are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing."

This is but the rule expressed in the *Goodman* case, and it is supported both by reason and by authority.

We insist that the rule of the *Goodman* case is the law of the land as that term is understood with reference to due process of law. This Court expressly declared that this rule was a *standard of conduct* that was clear and unmistakable, and that it *"should be laid down once for all by the courts"*. Can the very converse of this standard of conduct afford due process? To ask the question is but to emphasize the negative reply that must be given to it. This denial of due process of law is brought about by the application by the courts of section 4925. When so applied, this section falls squarely under the cases of *Myles*

Salt Co. v. *Board of Commissioners,* 239 U. S. 478, 60 L. ed. 392, and *Corn Products, etc., Co.* v. *Eddy,* 249 U. S. 427, 63 L. ed. 689, and is therefore void.

From this, it results that the State Supreme Court erred in refusing to sustain exception 6 of the present appellants.

The remaining grounds for asserting that due process of law is denied by this statute arise on the face of the statute itself and are so interwoven with the grounds asserting denial of the equal protection of the laws that they can be best considered under the discussion of that question.

C.—This Statute, Found in Section 4925 in Connection with Section 4903, Denies Railroads the Equal Protection of the Laws.

We consider first the equality denied to railroads by reason of the interpretation and application of the statute by the courts.

1. *Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a crossing collision case.*

The general rule in South Carolina is that a party plaintiff suing in *tort* not only must prove an act of negligence on the part of the defendant, but must prove also that such negligence was the proximate cause of his injury. This rule is universal except when a railroad is sued in a crossing collision case. In the present case, which arose under this crossing statute, *proximate cause was ignored.*

It is respectfully submitted that, while the classification of railroads for many purposes is justified, to take them out of the general rule requiring proof of proximate cause in actions *ex delicto* can be based on no rational grounds. It is simply invidious discrimination.

Frost v. *Corporation Commission,* 278 U. S. 515, 73 L. ed. 483;
Truax v. *Corrigan,* 257 U. S. 312, 66 L. ed. 254;
Connolly v. *Union, etc., Co.,* 184 U. S. 540, 46 L. ed. 679;
Cotting v. *Stock Yards,* 183 U. S. 79, 46 L. ed. 92;
Gulf, etc., R. Co. v. *Ellis,* 165 U. S. 150, 41 L. ed. 666.

Considering both the face of the statute and its construction by the State courts, we find:

1. *This statute makes the railroad liable for simple negligence, and at the same time declares that the traveler can not be defeated unless he was guilty of either wilfulness or a violation of law.*

On this point the language of Mr. Justice Cothran in the dissenting opinion, adopted by Judge Grimball, is so conclusive that we quote at length:

> "The statute is unconstitutional for another reason: It makes an unreasonable discrimination against railroad corporations in the matter of the contributory negligence of the injured person as a defense to the action for damages;

it requires the railroad corporation to show that the injured person, 'in addition to a mere want of ordinary care', was guilty of gross or wilful negligence or a violation of the law; a condition applicable to no other class of tort-feasors under the sun; it has no earthly connection with the police regulation contained in section 4903; it contributes nothing in aid of the enforcement of that section, and was evidently adopted for the purpose of making a railroad corporation an insurer of the safety of every traveler regardless of his conduct. In the case of *Glenn* v. *R. Co.*, 145 S. C. 41, the court goes even beyond the construction theretofore adopted in holding that the gross negligence referred to in the statute is the equivalent of intentional conduct on the part of the traveler, practically a suicide. It is there said:

" 'The term "gross negligence" does not stand by itself in the statute but the context characterizes the meaning and *gives it the significance of wilfulness'*. In other words, the railroad company is not excused if the traveler be shown to have been guilty of a mere want of ordinary care; nor if he be shown to have been guilty of gross negligence, although the statute so declares; he must be shown to have been guilty of wilfulness, and intentional disregard of all care" (R., pp. 211, 212).

The *Goodman* case shows conclusively that if there is any difference between the rights of these parties with respect to the use of the crossing, such difference exists in favor of the railroad. It is true, the *Goodman* case has been repudiated by the State Supreme

Court, but we submit it can not be rejected when it comes to making the test as to whether equal protection of the laws has been afforded.

The statute, as appears from its face, and as construed by the State court, in fixing entirely different rules of liability for the railroad and the traveler on the highway with respect to accidents at crossings, attempts a wholly arbitrary and unreasonable classification.

> *Frost* v. *Corporation Commission, supra*
> *Truax* v. *Corrigan, supra*
> *Connolly* v. *Union, etc. Co., supra*
> *Cotting* v. *Stock Yards, supra*
> *Gulf, etc., R. Co.* v. *Ellis, supra.*

In the *Frost* case the law is stated in these words:

> "The purpose of the clause in respect of equal protection of the laws is to *rest* the rights of all persons upon *the same rule under similar circumstances.*" (Italics added.)

This test inevitably destroys the statute here assailed.

2. *This statute is not applicable to the engineer, through whom the railroad alone acted.*

Section 4925 expressly declares that "the *corporation* shall be liable for all damages caused by the collision," and contains not a word that even tends to authorize a suit by the injured traveler against the engineer. Therefore, the only right of action against the engineer is that given by the common law, and the common law requires the plaintiff to prove not only

negligence on the part of the defendant but negligence as the proximate cause of the injury. And by the common law, the defendant in such a suit can defeat recovery by showing simple contributory negligence on the part of the plaintiff.

This then is the measure of liability of the engineer operating the train involved in the collision. But when we come to the railroad for which such engineer was acting, the rule is entirely different. Then proximate cause is established by presumption, the defense of contributory negligence is denied, and the railroad is relegated to proving as a defense to the acts of its engineer either wilfulness or violation of law by plaintiff as causes of the collision. Such being the situation, the railroad has no action over against the engineer who caused the collision, and must stand and deliver while the engineer goes free. How such gross discrimination respecting the same conditions can bear the remotest resemblance to the equal protection of the laws is beyond our comprehension.

Frost v. *Corporation Commission, supra*
Truax v. *Corrigan, supra*
Connolly v. *Union, etc., Co., supra.*
Cotting v. *Stock Yards, supra*
Gulf, etc. R. Co. v. *Ellis, supra.*

The fact that the railroad company can act alone through its engineer with respect to a crossing accident and be held liable under this statute, while the engineer can not be held liable at all under the statute but the case against him must be under the common law where all of his defenses are still available, while under the

statute common law defenses in favor of the railroad company are cut off, is such a gross discrimination that Judge Shipp, in his concurring opinion (R., p. 216), in effect stated that this of itself was such a vice in the statute as to render it unconstitutional if it had not been open to any other objection. We submit that the conclusion reached by this learned judge is correct, and even if the statute was not void for all the other reasons advanced, this would beyond question make it a violation of the equality clause of the Fourteenth Amendment, and therefore void.

3. *This statute is not applicable to all common carriers involved in the identical transaction.*

The object of this statute as construed and applied by the courts is not reasonable or fair, but constitutes invidious discrimination without any grounds in reason or justice therefor against railroads. This Court must take judicial notice of the fact that today our improved highways are crowded with motor buses and motor trucks engaged in the transportation both of persons and of property. All of the vehicles so engaged are common carriers. When a great motor bus as large as a street car and filled with passengers dashes onto a railroad crossing, the driver neither stopping, nor looking, nor listening, and a collision occurs, the driver or any of his passengers suing in the courts of South Carolina may invoke the provisions of this extraordinary statute. Each, as the representative or patron of the carrier on the highway, may claim the benefit of its arbitrary presumptions, of its

abolition of the ruling in the *Goodman* case, and of its limitation of defenses. It is exceedingly doubtful whether the railroad under our law can have a right of action against either the driver or the owner of the colliding carrier bus, but if it has, the liability must be established by actual proof and not *presumption* of proximate cause, and even then the proof of such proximate cause is not directed to negligence at all but to wilfulness or violation of law by such driver or owner of the bus. The rule established by this statute is not one that works both ways. It is unfair and constitutes an unjust and invidious discrimination against railroads, and therefore violates the equal protection of the laws clause of the Fourteenth Amendment.

Southern Railway Co. v. *Greene,* 216 U. S. 400, 54 L. ed. 536.

In the days before good roads and automobiles, it was one thing to require a railroad merely to explain a collision with a horse and buggy—a mere rule of evidence; but today, to say that every time a train hits an automobile it is guilty of negligence that proximately caused the collision, merely because one witness swears he heard no signal, is quite another. The automobile has revolutionized many things—the Nation's life itself. A rule may have been very well for horse and buggy days, but absurd today. Changed conditions brought about by the advent of automobiles and improved highways make it necessary to apply and enforce constitutional guaranties, where a few years ago there was no reason for such application and enforce-

ment. In speaking of this, in *Euclid* v. *Ambler Co.*, 272 U. S. 365, 71 L. ed. 303, this Court said:

> "In this there is no inconsistency, for while the *meaning* of constitutional guaranties never varies, the scope of their *application* must *expand* or *contract* to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, *after giving due weight to the new conditions*, are found clearly not to conform to the Constitution, of course, must fall."

By its unjust, unfair and unreasonable discriminations against railroads in favor of travelers on the highway in every particular herein discussed, this statute denies to railroads the equal protection of the laws and by such denial takes the property of the railroads without due process of law and turns it over to plaintiffs alleging injury in crossing accidents. Unless these two protecting clauses of the Fourteenth Amendment have become "a mere rope of sand, in no manner restraining State action" (*Gulf, etc., R. Co.* v. *Ellis, supra*), they compel the conclusion that this statute transcends the power of the State, and must therefore be declared void.

II. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, violate the inter-

state commerce clause of the Federal Constitution, and are therefore void. (Assignment of Errors 3; R., p. 218.)

The evidence showed conclusively that the train involved in the accident was carrying interstate mail and interstate passengers. Such train was therefore engaged in interstate commerce.

Galveston, etc. R. Co. v. *Woodbury,* 254 U. S. 357, 65 L. ed. 301;

International, etc. Co. v. *Pigg,* 217 U. S. 91, 54 L. ed. 678.

The rule, as established by this Court, is that "in the absence of congressional action, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are engaged in interstate commerce"; but the requirements of the State "*must not be arbitrary, or pass beyond a fair judgment of what the exigency demands*".

Atlantic, etc. R. Co. v. *Georgia,* 234 U. S. 280, 58 L. ed. 1312.

So that in order for this statute to meet the test thus prescribed, it must first of all be a safety regulation concerning the operations of trains. We have already shown that it is not a safety measure in any sense, but rather an insurance policy in favor of a traveler injured in a crossing collision.

But even if it could stand this test, it can not stand the others, for that it is arbitrary and unreasonable can admit of no doubt.

Now, in the *Goodman* case, this Court declared that when it came to a train on a railroad track and a traveler on the highway that crossed it, the traveler, not the train, must stop for the crossing. This statute reverses things and declares that the train, not the traveler, must stop. This is the only logical conclusion if the *Goodman* case is not law in South Carolina; and its Court declares such to be the case. This Court must know that there are hundreds of grade crossings in South Carolina, the vast majority of which are not inherently dangerous and are seldom used. Yet if the train must be prepared to stop for each of these, manifestly its operation would be seriously interfered with and a burden thus imposed on interstate commerce. In the case of *Southern Railway Co.* v. *King*, 217 U. S. 524, 54 L. Ed. 868, the Court said:

> "Highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains".

That case went off on a point of pleading, but when the same statute was attacked a second time in this Court and the question was properly raised in *Seaboard, etc., R. Co.* v. *Blackwell*, 244 U. S. 310, 61 L. Ed. 1160, it was held unconstitutional for the very reason stated in the quotation from the *Kings* case, *supra*. This statute, with the *Goodman* case repudiated, does exactly what the Georgia statute did, to-wit, compels the railroads to slacken speed of their trains at all crossings regardless of use or danger so as to be in position to

stop for travelers on the highway. If that statute regulated interstate commerce, this does likewise.

We are not contending that it is beyond the power of the State in the absence of Congressional action to limit the speed of all trains at busy crossings, and to take precautions for the safety of travelers at such crossings. But that is not this statute. With respect to the ordinary grade crossing, the *Goodman* case requires the traveler, not the train, to stop, and further requires the traveler to protect himself. It violates no constitutional principle to require signals for such a crossing, as this is within a "fair judgment of what the exigency demands". When, however, an arbitrary presumption of negligence of the railroad constituting the proximate cause of the accident is based on the failure to give signals *alone*, and it is declared in effect that the rights of the traveler with respect to the use of the crossing are superior to those of the railroad, then the State has stepped in and assumed a power over interstate commerce it does not possess.

In the *Goodman* case, this Court declared it was laying down a standard of conduct to be applied by all courts. For so saying the Court has been criticized, the contention of the critics being that the Court had no power to lay down such a standard of conduct. If not, why not? As we have already shown, this Court, and this Court *alone*, can say what is due process of law and what is the equal protection of the laws, and it clearly and conclusively appears that what the *Goodman* case really decides is merely what these constitutional guaranties compel to be decided as to the

respective rights and obligations of railroad and traveler at a grade crossing.

Likewise, this Court, and this Court *alone*, can say whether a statute burdens interstate commerce. In the *Goodman* case it only declared that when it comes to the use of a grade crossing by train and traveler, interstate commerce shall not be burdened by giving the traveler the right of way and by compelling the train to stop for his convenience.

This statute in effect attempts to legislate out of existence a decision of the Supreme Court of the United States respecting a subject—interstate commerce—over which its power is both exclusive and supreme.

How then, when such Court declares that respecting a train engaged in interstate commerce, the traveler at the crossing must stop for the train, not the train for him, can this South Carolina statute prescribe any other rule and hope to escape condemnation for attempting to regulate interstate commerce in violation of the provisions of the Federal Constitution?

In the dissenting opinion of Mr. Justice Cothran, which was adopted by Judge Grimball, the following additional reasons are given for holding this statute void as laying an undue burden on interstate commerce:

> "For another reason the statute, as interpreted, is an interference with interstate commerce:
>
> Under it the traveler is not to be held guilty of contributory negligence unless the defendant

company makes it appear that in addition to the mere want of ordinary care he has been guilty of gross or wilful negligence or a violation of law; to make it appear that he was guilty of gross negligence, the railroad company must show that he did not exercise even slight care, for gross negligence is the absence of that degree of care; hence the traveler is excused by the exercise of slight care; in other words, that is all that he is required to do.

In this day of heavy automobiles and incorporated passenger buses and freight truck lines, some of them with trailers transporting eighty bales of cotton, 40,000 pounds, is the danger of damage to the interstate train by a collision with them so negligible as to require of the driver only slight care to avoid it? Are the rights of the engineer and trainmen protected by so lax a requirement? Has the passenger upon a through train, interstate commerce, no right to demand even ordinary care on the part of the traveler to avoid a collision? Within the last year, upon a western railroad, a passenger train collided with a loaded freight truck at a crossing; the engine and passenger coaches were derailed and thirty passengers killed or injured. Did the truck driver comply with the law or with the dictates of humanity by exercising slight care? That may have been the rule in the days of horse-drawn vehicles, but not now'' (R., p. 215).

For the reasons advanced by us, as well as those advanced by the dissenting judges, we submit that it has been clearly established that this statute constitutes an unlawful interference with and a burden

upon interstate commerce, in violation of the provisions of the interstate commerce clause of the Federal Constitution, and is therefore void.

Conclusion.

From what has been said, the appellants have clearly established their contentions as to the constitutionality of the statute here under attack in every particular in which it has been assailed. We, therefore, earnestly contend that the three assignments of error should be sustained, that a judgment should be rendered holding Section 4925 of the South Carolina Code unconstitutional, and that the judgment of the State court should be reversed and the complaint dismissed.

Respectfully submitted,

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